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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Roofing and Metal Company, Inc. and
Port Enterprises, Inc., a Joint Venture

File: B-239457

Date: August 24, 1990

Donald O. Ferguson, Esq., Gardner, Ferguson, Sommers & Davis, for the protester.
A.R. Armstrong, for Alice Roofing & Sheet Metal Works, Inc., an interested party.
Captain Thomas H. Eshman, II, Department of the Air Force, for the agency.
Scott H. Riback, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency will improperly accept as responsive bid of firm whose bid bond was in an amount less than 20 percent of price bid for basic and option periods is denied where penal sum of bid bond is greater than difference between the firm's bid and next low bid for basic period.

DECISION

American Roofing and Metal Company, Inc. and Port Enterprises, Inc., a Joint Venture, protests the proposed acceptance of the bid of Alice Roofing & Sheet Metal Works, Inc. by the Department of the Air Force under invitation for bids (IFB) No. F41636-89-B-2044 for roof repairs and replacement services. American argues that Alice Roofing's bid is nonresponsive because the firm's bid bond is in an insufficient amount.

We deny the protest.

The IFB called for the submission of bids on a firm, fixed-price basis for the performance of roof repair and replacement services on an indefinite quantity basis for a base year and 1 option year. The IFB provided that the guaranteed minimum amount of work that would be ordered

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under the proposed contract was \$453,787. Bidders were required to submit a bid bond with their bids in the amount of \$3 million or 20 percent of the firm's "bid price," whichever was less. The Air Force received four bids with Alice Roofing submitting the apparent low bid and American submitting the apparent second-low bid. The difference between the bids was \$75,730 for the base year and \$104,902 for the base and option years combined. Alice roofing submitted a bid bond with a penal sum of \$90,757, which apparently constituted 20 percent of the minimum guaranteed work under the IFB rather than 20 percent of Alice Roofing's total price.

After concluding that Alice Roofing's bid was otherwise responsive, the contracting officer decided to waive the firm's noncompliance with the IFB's bid bond requirement pursuant to Federal Acquisition Regulation (FAR) § 28.101-4(b) (FAC 84-32), which allows waiver of a solicitation's bid bond requirement where the amount of a firm's bid bond is less than required but equal to or greater than the difference between the bid price and the next higher acceptable bid. In making this determination, the agency only considered the difference in bid prices for the basic 1-year requirement.

American argues that the agency erred in deciding to accept Alice Roofing's bid because the firm's bid bond was for an amount which was less than the difference between the two firm's bids for the base and option periods (i.e., \$104,902). American argues that the agency should have based its decision of the adequacy of Alice Roofing's bid bond on the difference in the bid prices for both the basic and option periods combined. In this regard, American directs our attention to previous decisions of this Office in which we found bids accompanied by commercial bid bonds to be nonresponsive despite the fact that these bonds were sufficient in amount to cover the difference between the principal's bid and the next low bid, and therefore sufficient in amount to meet the requirements for waiver outlined in FAR § 28.101-4(b). See, e.g., Johnson Controls, Inc., B-235517, Aug. 25, 1989, 89-2 CPD ¶ 177 (bid accompanied by a commercial bond which limits a surety's liability only to the difference between the bid price and the amount of a contract which is ultimately awarded, and does not specifically extend that liability to other costs which might be incurred in making that award [e.g., administrative costs], is nonresponsive). According to American, the amount of Alice Roofing's bond is similarly insufficient to cover "other costs which might be incurred in making an award," such as the costs associated with any procurement action necessary to meet the agency's option requirements.

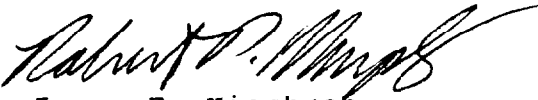
The agency responds simply that under our case law, it was required only to consider the difference in the bid prices for the base period in determining the sufficiency of Alice Roofing's bid bond.

As a general rule, a bid must contain an unequivocal offer to perform the exact thing called for under an IFB and must meet all of the IFB's material requirements, including any bid bond requirement, in order to be responsive. See, e.g., Stay, Inc., B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586. FAR § 28.101-4(b) contains an exception to this general rule and allows contracting agencies to determine as responsive a bid containing an insufficient bond where the penal sum of the bond, although for less than the sum called for under the IFB, is equal to or greater than the amount representing the difference between the principal's bid and the next low bid. In addition, our Office has also stated that, where an insufficient bid bond has been submitted under an IFB calling for both base and option performance periods, the bid may nonetheless be accepted as responsive where the penal sum of the bond is equal to or greater than the difference between the principal's base bid and the base bid of the next low bidder. Pacific Coast Utilities Serv., Inc., B-209003.2, Jan. 20, 1983, 83-1 CPD ¶ 73. Compare Fedserv Indus., Inc., B-222631, Aug. 19, 1986, 86-2 CPD ¶ 199 (agency may properly require bid bond covering 20 percent of entire bid for 3-year requirement where IFB contemplates award of single, multi-year contract rather than a base year contract plus subsequent-year options). Our rationale in requiring contracting agencies to consider only the difference in base period bids is that the government generally does not desire to pay a contractor in the form of a price that includes a premium for a bid bond that covers options for protection of only a contingent interest. See Pacific Coast Utilities Serv., Inc., B-209003.2, supra.

Additionally, we find the cases cited by the protester distinguishable from the instant case. In those cases, we did not object to the fact that the commercial bid bonds were limited as to amount but, rather, that the bonds in question contained a limitation regarding the nature of the surety's liability (*i.e.*, the surety's liability was limited to the cost of a "replacement" contract and did not extend to liability for any additional associated costs of procurement). Johnson Controls, Inc., B-235517, supra; Kiewit Western Co., 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497.

We conclude that the contracting officer in this case properly waived the IFB's bid bond requirement in accordance with FAR § 28.101-4(b) and therefore properly found that the bid of Alice Roofing was responsive.

The protest is denied.

for 
James F. Hinchman
General Counsel